United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7516

ORIGINAL

United States Court of Appeals

For the Second Circuit.

ROBERT G. BURDEWICK, individually and as representative of the Nassau County Patrolmen's Benevolent Association,

Plaintiff-Appellant,

against

DENIS E. DILLON, District Attorney of the County of Nassau, State of New York, RALPH G. CASO, County Executive in and for the County of Nassau, State of New York, and LOUIS J. FRANK, Commissioner of Police, Nassau County of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFFS-APPELLANTS.

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Table of Contents.

TABLE OF CASES.

Page

STATUTES.

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFF-APPELLANT.

Background of the Case.

This appeal, taken by plaintiff-appellant, is from a decision by the Hon. Justice John R. Bartels, United States District Judge for the Eastern District of New York, said decision being dated August 15, 1975, which granted defendants-appellees' motion dismissing plaintiff-appellant's complaint, which sought determinations that Section 8-14.0b of the Administrative Code in and for the County of Nassau as well as Section 426, subdivision 3, of the Election Law of the State of New York were in fact unconstitutional.

Initially, plaintiff-appellant, Robert G. Burdewick, individually and as representative of the Nassau County Patrolmen's Benevolent Association, brought in the District Court for the Eastern District of New York, a lawsuit pursuant to 28 U. S. C. 1343 (3) and 42 U. S. C. Section 1983, alleging that the defendants-appellees had violated plaintiff-appellant's civil rights under the First and Fourteenth Amendments to the United States Constitution. Suit was commenced in the District Court by the filing of a complaint on March 7, 1975.

In response to plaintiff-appellant's complaint, defendants-appellees brought a motion in the District Court returnable on April 25, 1975, seeking to have plaintiff-appellant's complaint dismissed upon the grounds that no factual issues existed and that Section 8-14.0b of the Nassau County Administrative Code was in fact constitutional and that plaintiff-appellant was not entitled to the relief requested in said complaint.

As a result of said motion to dismiss, the Hon. Justice John R. Bartels, District Court Judge of the Federal District Court for the Eastern District of New York, in a memorandum-decision and order dated August 15, 1975, granted defendants-appellees' motion and dismissed plaintiff-appellant's complaint. On September 2, 1975, plaintiff-appellant filed a notice of appeal with the United States Court of Appeals for the Second Circuit with regard to the memorandum-decision and order of the Hon. John R. Bartels dated August 15, 1975, said appeal being the basis for the proceedings currently before this court.

Questions Presented.

A. Whether or not the lower court was correct in dismissing plaintiff-appellant's complaint based upon the determination that under the facts and circumstances herein

presented, that Section 8-14.0b of the Administrative Code does not represent an unjustified intrusion into plaintiff-appellant's constitutional rights and is therefore constitutional?

B. Whether or not the lower court was correct in determining that Section 42C (3) of the election law of the State of New York had no applicability under the facts and circumstances as herein presented and therefore, the challenge by plaintiff-appellant to the constitutionality thereof was without merit?

Statement of Facts.

The plaintiff-appellant herein was appointed to the Nassau County Police Department as of January 2, 1957, in the capacity as a Patrolman, and has continued to be a member of said Police Department up to the present, having attained the rank of Sergeant.

Plaintiff-appellant has, prior to the commencement of this action, served as a lay member of the District Budget Committee of the North Merrick Union Free School District.

Prior to the commencement of this action, the plaintiff-appellant took steps to seek the elective office as a member of the School Board of the North Merrick Union Free School District. In particular, the plaintiff-appellant made a written request to the Commissioner of Police in and for the County of Nassau seeking a determination as to whether or not he would be in violation of Section 2103-a of the Election Law of the State of New York if he sought the office of member of the Board of Education in and for the North Merrick Union Free School District (annexed hereto as Exhibit A is a copy of said request).

In response thereto, the defendant-appellee, Louis J. Frank, by a letter dated November 19, 1974, advised the plaintiff-appellant herein that members of the Nassau County Police Department were precluded from serving as a School Board member in a school district situated in the County of Nassau since said actions would violate Section 8-14.0 of the Nassau County Administrative Code (a copy of said letter is annexed hereto as Exhibit B).

In accordance with the above, the plaintiff-appellant herein made inquiry of the North Merrick Union Free School District expressing his interest in seeking the vacancy existing on the North Merrick School Board, and made arrangements to be interviewed by the president of the Board of Education of the North Merrick Union Free School District, as evidenced by Exhibit C as annexed hereto.

As a result of the response from the defendant-appellee, Louis J. Frank (Exhibit B), plaintiff-appellant herein refrained from formally seeking and becoming a candidate for the position of School Board member out of fear of being in direct violation of Section 8-14.0 (b) of the Administrative Code in and for the County of Nassau, as well as out of fear of being in violation of Section 426, subdivision 3, of the Election Law of the State of New York.

In light thereof, and with the above as background, plaintiff-appellant instituted the lawsuit herein which challenges the constitutionality of Section 8-14.0 (b) of the Administrative Code of the County of Nassau, as well as challenges as unconstitutional Section 426, subdivision 3, of the Election Law of the State of New York, said lawsuit being instituted by the service of a summons and complaint upon the defendants-appellees herein on March 13, 1975.

Prior to defendants-appellees serving an answer upon the plaintiff-appellant, defendants-appellees brought on before this court a motion for summary judgment pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure upon the grounds that no factual issues exist, that Section 8-14.0 (b) of the Nassau County Administrative Code was constitutional and that plaintiff-appellant is not entitled to the relief requested in his complaint.

Statutes in Question.

A. Section 8-14.0 (b) of the Administrative Code in and for the County of Nassau, which reads as follows:

> "8-14.0 Resignation; unexplained absence.
>
> "a. * * *.
>
> "b. Any member of the police force who shall accept any place of public trust or civil emolument, or shall be publicly nominated for an elective office, and shall not within ten days thereafter publicly decline such nomination, shall be deemed thereby to have vacated his office."

B. Section 426, subdivision 3, of the Election Law of the State of New York, which reads as follows:

> "§426. Misdemeanors concerning police commissioners or officers or members of any police force. Any person who, being a police commissioner or an officer or member of any police force in this state:
>
> "1. * * *.
>
> "2. * * *.

"3. Contributes any money, directly or indirectly, to, or solicits, collects or receives any money for, any political fund, or joins or becomes a member of any political club, association, society or committee, is guilty of a misdemeanor."

C. Section 2103-a of the Election Law of the State of New York, which reads as follows:

"2103-a. Policemen and firemen on boards of education.

"Notwithstanding any general, special or local law, ordinance or charter provision to the contrary, or any rule or regulation, policemen and firemen employed by any municipal subdivision of the state or police district provided they are otherwise eligible, may be candidates for election and serve as members of boards of education in school districts located:

"(1) other than in the municipality where they perform their duties as policemen or firemen on a regular basis, or (2) unless prohibited by the legislative body for whom they are employed, in school districts located in the locality where they perform their duties as policemen and firemen."

POINT I.

It is respectfully submitted to this court, as evidenced below, that the factual background upon which this case is based is not in dispute.

With regard to plaintiff-appellant's first point on appeal, it is respectfully submitted to this court that the lower court erred in determining that Section 8-14.0 (b) of the Nassau County Administrative Code was in fact constitutional as currently worded.

There can be no doubt that Section 8-14.0 (b) of the Nassau County Administrative Code is a clear and direct infringement upon the exercise of the constitutional guarantees of free speech, the right to peaceable assemble and to petition the government for redress of grievances as set forth in the first amendment to the United States Constitution (see *Sweezy v. New Hampshire*, 354 U. S. 234, 1 L. Ed. 1311, 1957).

In addition, it should be noted by the court that, although public employment is not a constitutional right, government can no longer unjustifiably place conditions upon such employment such that said employment conditions infringe an employee's constitutional rights. See *Keyishan v. Board of Regents of New York*, 385 U. S. 589 (1967); *Elfbrandt v. Russell*, 384 U. S. 11 (1966); and *Pickering v. Board of Education*, 391 U. S. 563 (1968).

In *Shapiro v. Thompson*, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1968), it was held that, when it came to fundamental constitutional rights, a governmental entity could not prohibit or place a "chilling effect" upon the exercise of said fundamental constitutional rights unless there could be demonstrated that a compelling governmental interest would be promoted. In *Shapiro v. Thompson, supra*, the court stated:

> "• • • appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional • • •."

In addition to exposing this "compelling governmental interest" doctrine as a justification for permitting some limitations to be placed upon the exercise by governmental employees of fundamental constitutional rights,

the court in *Keyishan v. Board of Regents of New York, supra,* specifically limited this doctrine such that even if there can be demonstrated that there is a compelling governmental interest to promote, that interest must be promoted by narrowly drawn legislation which will have the least effect upon the exercise of the fundamental constitutional right in issue. As set forth in *Keyishan v. Board of Regents of New York, supra:*

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

With the above case law as background, this court's attention is now drawn to the issue of whether or not the defendants-appellees can demonstrate that a compelling governmental interest exists which can be promoted only by the provisions set forth in Section 8-14.0 (b) of the Nassau County Administrative Code which states:

> "8-14.0 Resignation; unexplained absence.
>
> "a. * * *.
>
> "b. Any member of the police force who shall accept any place of public trust or civil emolument, or shall be publicly nominated for an elective office, and shall not within ten days thereafter publicly decline such nomination, shall be deemed thereby to have vacated his office."

With regard thereto, plaintiff-appellant herein respectfully submits that there exists no legally recognized justification for the infringement of plaintiffs-appellants' constitutional guarantees under the first amendment as placed upon him by Section 8-14.0 (b) of the Nassau County Administrative Code. In the first instance, for plaintiff-appellant to be required to vacate his "office" as a police

officer merely by being "publicly nominated for an elective office" independent of whether or not he is actually elected to said office, results in the elimination of prospective candidates from the political spectrum as relating to School Board elections since a candidate such as the plaintiff-appellant herein, must determine that, before he will seek nomination, he will terminate his employment, independent of whether or not he is successful in said candidacy.

To place such a burden upon the plaintiff-appellant herein without legal justification, and it is respectfully submitted in the context of the case law cited above that none exists under the facts and circumstances of the case herein presented, results in an infringement of plaintiff-appellant's constitutional guarantees as set forth in the first amendment to the United States Constitution.

In addition, it is respectfully submitted to this court that even omitting the obligation on the part of the plaintiff-appellant under Section 8-14.0 (b) of the Nassau County Administrative Code to vacate his "office" within ten (10) days after accepting public nomination for an elective office, but to require his vacating said office upon actual election, that same would also be an unwarranted infringement of plaintiff-appellant's constitutional guarantees as set forth above and should not be tolerated.

As reinforcement of the above, this court's attention is directed to Section 2103-a of the Education Law of the State of New York which states as follows:

> "2103-a. Policemen and firemen on boards of education.
>
> "Notwithstanding any general, special or local law, ordinance or charter provision to the contrary,

> or any rule or regulation, policemen and firemen employed by any municipal subdivision of the state or police district provided they are otherwise eligible, may be candidates for election and serve as members of boards of education in school districts located:
>
> "(1) other than in the municipality where they perform their duties as policemen or firemen on a regular basis, or (2) unless prohibited by the legislative body for whom they are employed, in school districts located in the locality where they perform their duties as policemen or firemen."

As is readily apparent from reading the above, the Legislature of the State of New York gave to local governments an option as to whether or not there should be restrictions placed upon policemen, such as plaintiff-appellant herein, as evidenced by Section 8-14.0 (b) of the Nassau County Administrative Code. As is evident from a reading of Section 8-14.0 (b) of the Nassau County Administrative Code, the County of Nassau elected to prohibit police officers such as plaintiff-appellant herein from being the candidate as well as a member of a local school board.

It is respectfully submitted to this court that, in light of the case law previously cited regarding the first amendment guarantees, the mere fact that a statute exists or that a local ordinance is enacted in accordance therewith does not, in and of itself, warrant the conclusion that said legislative actions are constitutional.

On the contrary, it is respectfully submitted to this court that Section 8-14.0 (b) of the Nassau County Administrative Code and thus by implication that portion of Section 2103-a of the Education Law of the State of New York which is relevant are unconstitutional and therefore null, void and of no legal effect.

In the holding below, the court referred to *United Public Workers of America v. Mitchell,* 330 U. S. Ct. 556, 91 L. Ed. 754 (1947), as reaffirmed in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO* (No. 72-634; June 25, 1973), 41 L. W. 5122, as well as *Broadrick v. Oklahoma,* 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), in support of its contention that political activities of governmental employees can be restricted. Plaintiff-appellant does not dispute the above, however, plaintiff-appellant takes exception to the applicability of same with regard to the facts and circumstances as herein presented.

Initially, it should be noted by the court that plaintiff-appellant contends that the holdings in *United Public Workers of America v. Mitchell, supra,* and its reaffirmation in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO, supra,* are not controlling under the facts and circumstances of this case, since those cases were related to the "Hatch Act" which regulates activities of Federal Employees and did not directly concern themselves with the statute herein. As will be more fully set forth in this brief, there are significant distinctions between the statute in question and the Hatch Act which are of a material nature that thereby distinguish the issues presented herein from those determined by the above referenced cases which concerned themselves with the Hatch Act.

In the first instance, the wording of the Hatch Act and the interpretation thereof by the Civil Service Commission permits activity that is prohibited by Section 8-14.0 (b) of the Nassau County Administrative Code. In particular, the court's attention is drawn to the Commission's interpretation of the meaning and extent of said Commission's pre-1940 decisions which set forth permitted acitvities of governmental employees that fall under the

Hatch Act. In defining what is meant under the Hatch Act by "an active part in political management or in political campaigns" attention is drawn to 5 C. F. R., Part 733, Sections 733.101-402 (1972), and in particular Section 733.111 which reads as follows:

> "Section 733.111 Permissible activities. (a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—
>
> "(1) Register and vote in any election;
>
> "(2) Express his opinion as an individual privately and publicly on political subjects and candidates;
>
> "(3) Display a political picture, sticker, badge, or button;
>
> "(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;
>
> "(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;
>
> "(6) Attend a political convention, rally, fundraising function, or other political gathering;
>
> "(7) Sign a political petition as an individual;
>
> "(8) Make a financial contribution to a political party or organization;
>
> "(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by Section 733.124;

"(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

"(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

"(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

"(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

"(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests."

As is readily apparent from review of the above, Section 733.111, which sets forth permissible activities of governmental employees whose activities are regulated by the Hatch Act, permits said employees to make a financial contribution to a political party or organization; *take an active part as a candidate or in support of an independent candidate in a partisan election, according to certain criteria;* be politically active in connection with a question which is not specifically identified with a political party; attend a political convention, rally, fund rais-

ing function, or other political gathering; participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization; and *be a member of a political party or other political organization and participate in its activities to the extent consistent with law.* (Italics added.)

With the above in mind, it is respectfully submitted to this court that *United Public Workers of America v. Mitchell, supra,* and the Hatch Act should not be precedents for unholding the constitutionality of Section 8-14.0(b) of the Nassau County Administrative Code, since, it is respectfully submitted that political activities permitted of governmental employees under the Hatch Act are specifically prohibited of police officers under said code provision.

As stated previously, it is plaintiff-appellant's contention that *United Public Workers of America v. Mitchell, supra,* is not determinative of the issues presented herein, and the Supreme Court's recent decision in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO, supra,* which upheld the constitutionality of the Hatch Act, is also not determinative of the issues presented herein since the question raised in the *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO, supra,* was whether or not the questioned language of the Hatch Act carried with it such specificity, in light of prior Civil Service rulings with regard thereto, as to render said language free of vagueness and overbreadth so as not to be unconstitutional. The Supreme Court in its opinion held that the prior Civil Service Commission's rulings, as to the interpretation of the language in question, were of such a character as to provide an individual with sufficient specificity as to those acts which are permitted as well as prohibited under such language of the Hatch Act as

to render said language free from being unconstitutionally vague and free from overbreadth.

With regard to the holding below, and the court's reference to *Broadrick v. Oklahoma, supra,* it is respectfully submitted to this court that the holding therein is not determinative of the issues herein raised. In *Broadrick v. Oklahoma, supra,* appellants therein engaged in partisan political activities which included the solicitation of money from co-workers for the benefit of their superior, said actions being directly contrary to a statute which specifically prohibited such conduct as well as other conduct related to participation in other political activities. Appellants therein attempted to claim that since the statute in question reached activities that were constitutionally protected, as well as activities that were not, that therefore said statute was unconstitutional on its face and thereby void, resulting in rendering appellants' patent illegal conduct under said statute no longer illegal. The court, in its opinion, stated:

> "Even if the outermost boundaries of §8'8 may be imprecise, any such uncertainty has little relevance here, where Appellee's conduct falls squarely within the 'hard core' of the statute's proscriptions and Appellants concede as much."

The court went on to state that:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

As can readily be seen from the above, the court in *Broadrick v. Oklahoma, supra,* stated that where an individual admits to conduct which may properly be restrained, that said individual is thereby prohibited from attempting to claim that other portions of said regulatory statute are unconstitional as possibly applied to others who are not before the court and thus nullify the entire statute thereby rendering this conduct free from illegality.

The court in *Broadrick v. Oklahoma, supra,* was obviously guided in its decision by the fact that appellants therein participated in patent illegal conduct which appellants did not deny, but the effects of which appellants attempted to nullify by alleging that the statute in question was unconstitutional as it could possibly be construed with regard to certain conduct by certain individuals, neither conduct nor individuals being before the court.

The court in *Broadrick v. Oklahoma, supra,* rejected appellants' contentions basing its decision upon the fact that the activities of appellants were unquestionably a violation of the statute in question, as well as the fact that said actions represented conduct which was the proper subject matter for regulation by the state. The court did recognize that the language of the statute in question was possibly overbroad, but did not consider same with regard to appellants since appellants' conduct did fall directly within the bounds of conduct sought to be regulated by this statute. As stated by the court, "It is our view that §818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

For the reason stated above, plaintiff-appellant respectfully submits to this court that *Broadrick v. Oklahoma, supra,* does not stand as a basis for concluding that Section 8-14.0(b) of the Nassau County Administrative Code is constitutional.

In view of the above, it is respectfully submitted to this court that the holdings in *Perry v. St. Pierre,* F. 2d , slip op. 3831 (2d Cir., May 29, 1975), and *Paulos v. Breier,* 507 F. 2d 1383 (7th Cir. 1974), are not determinative of the issues presented herein.

POINT II.

With regard to plaintiff-appellant's second point on appeal, it is respectfully submitted to this court that the lower court erred in concluding that Section 426, subdivision 3, of the Election Law of the State of New York was not relevant to the proceedings herein.

To clarify plaintiff-appellant's position with regard thereto, it should be noted by this court that the applicability of Section 426, subdivision 3, of the Election Law of the State of New York, and the issue of its constitutionality, could only come into play should it be held and determined that Section 8-14.0(b) of the Nassau County Administrative Code, as currently worded, was an unconstitutional infringement of plaintiff-appellant's constitutional guarantees, since to permit an individual to seek the nomination for a position on a local school board but then deny him the political tools to successfully compete in the political arena to achieve election thereto, is according to plaintiff-appellant's contention, an infringement of plaintiff-appellant's constitutional guarantees.

As stated above, for plaintiff-appellant tc actively campaign for the position of member of said School Board while still working as a Nassau County Police Officer, assuming that this court strikes down as unconstitutional Section 8-14.0(b) of the Nassau County Administrative Code, that under said circumstances the plaintiff-appellant herein will need to exercise the political activities of seeking money directly or indirectly through solicitation or otherwise so as to generate a political fund to pay for his costs associated with seeking said School Board position as well as seeking political association with possible political clubs, associations, societies or committees, as assistance to seeking said nomination, all of which would be in violation of Section 426, (3) of the Election Law of the State of New York in the context of the above.

It is plaintiff-appellant's contention that Section 426, subdivision 3, of the Election Law of the State of New York is void on its face as it prohibits the exercise of fundamental constitutional rights set forth in the First Amendment to the United States Constitution, and that, additionally, it discriminates against policemen unjustifiably and is, therefore, a violation of the due process and equal protection guarantees set forth in the Bill of Rights of the United States Constitution.

There can be no doubt that Section 426, subdivision 3, of the Election Law of the State of New York is a clear and direct infringement upon the exercise of the constitutional guarantees of free speech, the right to peaceably assemble and to petition the government for redress of grievances as set forth in the First Amendment to the United States Constitution, as recognized in *Sweezy v. New Hampshire, supra.*

In addition, it should be noted by the court that, although public employment is not a constitutional right, government can no longer unjustifiably place conditions upon such employment such that said employment conditions infringe an employee's constitutional rights. See *Keyishan v. Board of Regents of New York,* 385 U. S. 589 (1967); *Elfbrandt v. Russell,* 384 U. S. 11 (1966), and *Pickering v. Board of Education,* 391 U. S. 563 (1968).

In *Shapiro v. Thompson,* 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1968), it was held that, when it came to fundamental constitutional rights, a governmental entity could not prohibit or place a "chilling effect" upon the exercise of said fundamental constitutional rights unless there could be demonstrated that a compelling governmental interest would be promoted. In *Shapiro v. Thompson, supra,* the court stated:

> "* * * appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional * * *."

In addition to exposing this "compelling governmental interest" doctrine as a justification for permitting some limitations to be placed upon the exercise by governmental employees of fundamental constitutional rights, the court in *Keyishan v. Board of Regents of New York, supra,* specifically limited this doctrine such that even if there can be demonstrated that there is a compelling governmental interest to promote, that interest must be promoted by narrowly drawn legislation which will have the least effect upon the exercise of the fundamental constitutional right in issue. As set forth in *Keyishan v. Board of Regents of New York, supra:*

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

With the above case law as background, this court is thus presented with two questions. The first of which is whether or not the defendants-appellees can demonstrate that a compelling governmental interest exists which can be promoted only by prohibiting police commissioners or officers or members of a police force from doing that which is set forth in Section 426, subdivision 3, of the Election Law of the State of New York. The second question presented the court is, assuming that the state has demonstrated that a compelling governmental interest does exist, then, does the language of Section 426, subdivision 3, meet the "narrow specificity" doctrine stated in *Keyishan v. Board of Regents of New York, supra,* which must be met by any governmental attempt to regulate in the area of First Amendment rights.

As to the first question, Section 426, subdivision 3, singles out police commissioners and officers or members of a police force of the state from the rest of the state's employees and prohibits their participating in particular conduct, namely:

—Contributing any money directly or indirectly to any political fund,
—Collecting or receiving any money for any political fund,
—Joining or becoming a member of any political club, association, society or committee.

Plaintiff-appellant does not dispute that government generally has a greater interest in regulating the activities of its employees that it does other citizens. However, plaintiff-appellant fails to see a compelling governmen-

tal interest that is met by prohibiting a police commissioner or officer or member of a police force of the state from voluntarily, and without being solicited, contributing, let us say, one dollar to either the Democratic or Republican party; to actively participate in an organization that supports or opposes local bond issues; to actively participate in, to contribute, or join an organization that fosters environmental conversation; or actively participate by joining, contributing to, or assisting organized efforts for improvement of public schools, opposition to racial discrimination, or opposition to poverty, sex bias, war, or other causes which are characterized by the timeliness of our developing society, and with regard to the facts and circumstances herein presented, for a police officer seeking the elective office of member of a School Board, and to actively seek financial assistance with regard thereto as well as local political backing by [illegible] tion in the tradition of the American political scene.

Under Section 426 (3) of the Election Law of the State of New York, plaintiff-appellant contends that all of the above activities are subject to being interpreted as patent violations of Section 426 (3), there being no specificity with regard to the language of Section 426 (3) so as to designate what is and what isn't permissible conduct for a Police Officer in the area of his First Amendment guarantees. Furthermore, said section encompasses both partisan and nonpartisan political activities, which extends the prohibitions of said Section to conduct that is permissible for Federal employees under the "Hatch Act."

With regard to the second question presented to the court, plaintiff-appellant contends that the wording of Section 426, subdivision 3, is vague and indefinite, overly broad and, therefore, inconsistent with the dictates set forth by the Supreme Court with respect to regulating

First Amendment rights. See *Shapiro v. Thompson, supra; United States v. Robel,* 389 U. S. 258, 19 L. Ed. 508, 88 S. Ct. 419 (1967).

In accordance with the above, the court's attention is drawn to *Hobbs v. Thompson,* 488 F. 2d 456 (1971), which discussed the question of specificity with regards to legislation directed at First Amendment rights, the court stating in particular:

> "* * * Macon has simply not aimed precisely at particular, specific evils which might justify political regulation. Bland assurances that the Macon scheme contributes to the 'reasonable neutrality' of public employees or constitutes a 'worthy aim' do nothing to overcome the fatal overbreadth of the charter and ordinance provision in question."

Under the circumstances of this case, the defendants-appellees, in attempting to prohibit evils that might result from the exercise by plaintiff-appellant of his First Amendment rights, have sought to achieve their desired aim by simply prohibiting the rights in their entirety. The mere fact that abuses may result in the exercise of a constitutional right does not warrant legislation that abolishes the right in its entirety. On the contrary, it is the abuse of the right which must be legislated against and not the right itself. *Shapiro v. Thompson, supra; Keyishan v. Board of Regents of New York, supra; Hobbs v. Thompson, supra,* and *United States v. Robel, supra.*

In support of plaintiff-appellant's contention that Section 426, subdivision 3, is vague, indefinite, and overly broad, as well as that the state has failed to set forth a compelling governmental interest that requires the enactment of said Section, the court's attention is drawn to a recent decision out of the United States District Court of Rhode Island, decided April 17, 1972, reported as *Man-*

cuso v. Taft, et al., 341 Fed. Sup. 574 (1972), affirmed on appeal 476 F. 2d 187 (1973), wherein the court considered the constitutionality of certain provisions of the city charter, one of which being city charter Section 14.09 (f) which provided as follows:

> "The following practices are prohibited: (f) Make directly or indirectly as a member of the classified service any contribution to the campaign funds of any political organization or candidate for public office or taking any part in the management of any political organization or in the conduct of any political campaign fund than in the exercise of the rights of a citizen to express his opinion and to cast his vote."

In determining that such section was unconstitutional, the court stated:

> "Charter Section 14.09 (f) suffers from both overbreadth and vagueness. In addition to its other faults, the section does not limit itself to partisan political activity and thus is broader than the provisions approved in *Mitchell*. While it may be permissible to restrict political activities such as using official authority for partisan political purposes, political coercion of subordinates, or non-compliance with the merit system in promotion, the shotgun approach taken here is impermissible. See T. Emerson, *The System of Freedom of Expression*, 587-592 (1970). Section 14.09 (f) prohibits expression, association, and activities whose suppression is unrelated to any of the legitimate ends discussed. Substantially similar language was found to be an unconstitutional restriction on First Amendment freedoms in *Gray v. City of Toledo*, 323 F. Supp. 1281, 1288 (N. D. Ohio 1971)."

Plaintiff-appellant respectfully submits to the court that, even in light of the recent holding in the *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 413 U. S. 547, 93 S. Ct. 8220, 37 L. Ed. 796, the above excerpts from the opinion in *Mancuso v. Taft, et al., supra,* properly set forth the state of the law to date and, therefore, this court should hold that Section 426 (3) of the Election Law of the State of New York is unconstitutionally vague and overly broad.

In the holding below, the court referred to *United Public Workers of America v. Mitchell,* 330 U.S. S. Ct. 556, 91 L. Ed. 754 (1947), as reaffirmed in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO* (No. 72-634; June 25, 1973), 41 L. W. 5122, as well as *Broadrick v. Oklahoma,* 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), in support of its contention that political activities of governmental employees can be restricted. Plaintiff-appellant does not dispute the above; however, plaintiff-appellant takes exception to the applicability of same with regard to the facts and circumstances as herein presented.

Initially, it should be noted by the court that plaintiff-appellant contends that the holdings in *United Public Workers of America v. Mitchell, supra,* and its reaffirmation in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO, supra,* are not controlling under the facts and circumstances of this case, since those cases were related to the "Hatch Act" which regulates activities of Federal employees and did not directly concern themselves with the statute herein. As will be more fully set forth in this brief, there are significant distinctions between the statute in question and the Hatch Act which are of a

material nature that thereby distinguish the issues presented herein from those determined by the above referenced cases which concerned themselves with the Hatch Act.

In the first instance, the wording of the Hatch Act, and the interpretation thereof by the Civil Service Commission, permits activity that is prohibited under Section 426 (3) of the Election Law of the State of New York. In particular, the court's attention is drawn to the Commission's interpretation of the meaning and extent of said Commission's pre-1940 decisions which set forth permitted activities of governmental employees that fall under the Hatch Act. In defining what is meant under the Hatch Act by "an active part in political management or in political campaigns" attention is drawn to 5 C.F.R., Part 733, Section 733.101-.402 (1972), and in particular Section 733-111 reads as follows:

> "Section 733.111. Permissible activities. (a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—
>
> "(1) Register and vote in any election;
>
> "(2) Express his opinion as an individual privately and publicly on political subjects and candidates;
>
> "(3) Display a political picture, sticker, badge, or button;
>
> "(4) Participate in the nonpartisan activities civic, community, social, labor, or professional organization, or of a similar organization;

"(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

"(6) Attend a political convention, rally, fundraising function, or other political gathering;

"(7) Sign a political petition as an individual;

"(8) Make a financial contribution to a political party or organization;

"(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by Section 733.124;

"(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

"(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

"(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

"(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

"(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while

in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests."

As is readily apparent from review of the above, Sec-733.111, which sets forth permissible activities of governmental employees whose activities are regulated by the Hatch Act, permits said employees to make a financial contribution to a political party or organization; *take an active part as a candidate or in support of a candidate in a nonpartisan election, according to certain criteria;* be politically active in connection with a question which is not specifically identified with a political party; attend a political convention, rally, fund raising function, or other political gathering; participate in the nonpartisan activities of a civic, community, social, labor or professonial organization, or of a similar organization; and *be a member of a political party or other political organization and participate in its activities to the extent consistent with law.* (Italics added.)

With the above in mind, it should be obvious to this court that *United Public Workers of America v. Mitchell, supra,* and the Hatch Act are not precedents for unholding the constitutionality of Section 426 (3) of the Election Law of the State of New York, since political activities permitted of governmental employees under the Hatch Act are specifically prohibited of police officers under Section 426, subdivision 3.

In furtherance of plaintiff-appellant's contention that Section 426 (3) of the Election Law of the State of New York is unconstitutional, plaintiff-appellant contends that,

even though *United Public Workers of America v. Mitchell, supra,* upheld the constitutionality of the Hatch Act, said decision is not determinative of the issues presented herein.

With regard thereto, it should be noted that the "right-privilege" distinction as to public employment upon which *United Public Workers of America v. Mitchell, supra,* was based, has since been abolished by a series of Supreme Court decisions. See, *Graham v. Richardson,* 403 U. S. 365, 91 S. Ct. 1848 (1971); *Pickering v. Board of Education, supra; Keyishan v. Board of Regents, supra; Elfbrandt v. Russell, supra; Shelton v. Tucker,* 364 U. S. 479, 81 S. Ct. 247 (1960); *Speiser v. Randall,* 357 U. S. 513, 78 S. Ct. 1332 (1958); *Slochower v. Board of Higher Education,* 350 U. S. 551, 76 S. Ct. 637 (1956); *Wieman v. Updegraff,* 344 U. S. 183, 73 S. Ct. 215 (1952). Furthermore, the reasonable standard test employed by the court in *United Public Workers of America v. Mitchell, supra,* is no longer applicable to the regulating of First Amendment rights of public employees. See, *Pickering v. Board of Education, supra; United States v. Robel, supra; Keyishan v. Board of Regents, supra; Elfbrandt v. Russell, supra; NAACP v. Button, supra; Shelton v. Tucker, supra; Sweezy v. State of New Hampshire, supra; Wieman v. Updegraff, supra.*

As stated previously, it is plaintiff-appellant's contention that *United Public Workers of America v. Mitchell, supra,* is not determinative of the issues presented herein, and the Supreme Court's recent decision in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO, supra,* which upheld the constitutionality of the Hatch Act, is also not determinative of the issues presented herein since the question raised in the *United States Civil Service Commission v. National As-*

sociation of Letter Carriers AFL-CIO, supra, was whether or not the questioned language of the Hatch Act carried with it such specificity, in light of prior Civil Service rulings with regard thereto, as to render said language free of vagueness and overbreadth so as not to be unconstitutional. The Supreme Court in its opinion held that the prior Civil Service Commission's rulings, as to the interpretation of the language in question, were of such a character as to provide an individual with sufficient specificity as to those acts which are permitted as well as prohibited under such language of the Hatch Act as to render said language free from being unconstitutionally vague and free from overbreadth.

With regard to the holding below, and the court's reference to *Broadrick v. Oklahoma, supra,* it is respectfully submitted to this court that the holding therein is not determinative of the issues herein raised. In *Broadrick v. Oklahoma, supra,* appellants therein engaged in partisan political activities which included the solicitation of money from co-workers for the benefit of their superior, said actions being directly contrary to a statute which specifically prohibited such conduct as well as other conduct related to participation in other political activities. Appellants therein attempted to claim that since the statute in question reached activities that were constitutionally protected, as well as activities that were not, that therefore said statute was unconstitutional on its face and thereby void, resulting in rendering appellants' patent illegal conduct under said statute no longer illegal. The court, in its opinion, stated:

> "Even if the outermost boundaries of §818 may be imprecise, any such uncertainty has little relevance here, where Appellee's conduct falls squarely within the 'hard core' of the statute's proscriptions and Appellants concede as much."

The court went on to state that:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

As can readily be seen from the above, the court in *Broadrick v. Oklahoma, supra,* stated, that where an individual admits to conduct which may properly be restrained, that said individual is thereby prohibited from attempting to claim that other portions of said regulatory statute are unconstitutional as possibly applied to others who are not before the court and thus nullify the entire statute thereby rendering his conduct free from illegality.

The court in *Broadrick v. Oklahoma, supra,* was obviously guided in its decision by the fact that appellants therein participated in patent illegal conduct which appellants did not deny, but the effects of which appellants attempted to nullify by alleging that the statute in question was unconstitutional as it could possibly be construed with regard to certain conduct by certain individuals, neither conduct nor individuals being before the court.

The court in *Broadrick v. Oklahoma, supra,* rejected appellants' contentions basing its decision upon the fact that the activities of appellants were unquestionably a violation of the statute in question, as well as the fact that said actions represented conduct which was the proper subject matter for regulation by the state. The court did recognize that the language of the statute in question was possibly overbroad, but did not consider same with regard to appellants since appellants' conduct did

fall directly within the bounds of conduct sought to be regulated by this statute. As stated by the court, "It is our view that §818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."

For the reasons stated above, plaintiff-appellant respectfully submits to this court that *Broadrick v. Oklahoma, supra,* does not stand as a basis for concluding that Section 426 (3) of the Election Law of the State of New York is constitutional.

In light of the above, it is respectfully submitted to this court Section 426, subdivision 3, of the Election Law of the State of New York, is unconstitutional.

CONCLUSION.

For the reasons stated above, it is respectfully submitted to this court that the lower court's determination should be overturned.

Respectfully submitted,

HARTMAN & ALPERT,
Attorneys for Plaintiff-Appellant,
300 Old Country Road,
Mineola, N. Y. 11501
(516) 742-9000

ALLEN R. MORGANSTERN,
Of Counsel.

EXHIBIT A.

POLICE DEPARTMENT
COUNTY OF NASSAU, NEW YORK

COPY TO

INTERNAL CORRESPONDENCE

DATE November 12,1974

TO Commissioner of Police (Through Official Channels)

FROM Sergeant Burdewick, R., Shield Number 206, Second Precinct

SUBJECT REQUEST FOR RULING ON NEW LAW

1. The writer requests a Departmental and/or County ruling on Section 2103-a, Chapter 949, Laws of New York 1974, entitled "Board of Education - Membership - Policemen and Firemen".

2. The request for an interpretation of this law which took effect on September 13, 1974 is due to the writer's being approached to fill a vacant seat on the North Merrick School Board, District #29, North Merrick, New York.

R. Burdewick
Sergeant

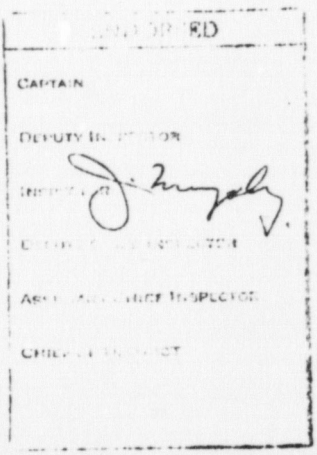

EXHIBIT B.

POLICE DEPARTMENT
COUNTY OF NASSAU, NEW YORK

COPY TO

INTERNAL CORRESPONDENCE

DATE November 19, 1974

TO Sergeant R. Burdewick, Shield Number 206, Second Precinct

FROM Commissioner of Police

SUBJECT RULING ON NEW LAW

In response to your inquiry concerning the application of Section 2103-a, of the Education Law, be advised that said statute only permits a police officer to serve as a member of the Board of Education in a school district located within his employing municipality (Nassau County) if there is no existing legislative prohibition. In Nassau County such a prohibition exists and is set forth in Section 8-14.0 of the Nassau County Administrative Code. Consequently, members of the Nassau County Police Department are precluded from serving as a school board member in a school district situated in the County of Nassau.

Louis J. Frank
Commissioner of Police

LJFrc

EXHIBIT C.

NORTH MERRICK

UNION FREE SCHOOL DISTRICT

1775 OLD MILL ROAD
MERRICK, N.Y. 11566
(516) 379-4070

November 15, 1974

Mr. Robert Burdewick
1542 William Street
Merrick, New York 11566

Dear Mr. Burdewick:

Thank you for your recent letter expressing your interest in being considered for the vacancy on the North Merrick School Board.

We would appreciate having the opportunity to discuss your background and experience in greater detail and would like to meet with you on Tuesday, November 26th, at 9:50 p.m. in the Board Room of the Old Mill Road School. Please confirm the time and date by calling Mrs. Sheila McDonnell, our District Clerk, at 546-9119.

If there is additional information concerning your qualifications which you feel would be helpful to us in making our decision, please forward it to us prior to the interview date.

Very truly yours,

Madeline Davis
President

United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Robert G. Burdewick, individually and as representative of the Nassau County Patrolman's Benevolent Association,
Plaintiff-Appellant

against

Dennis E. Dillon, District Attorney County of Nassau, State of New York Ralph G. Caso, County Executive in and for the County of Nassau, State of New York and Louis J. Frank, Commissioner of Police, Nassau County of the State of New York
Defendants-Appellees

On appeal from the United States District Court for the Eastern District of New York,

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Hartman & Alpert Esqs., being duly sworn deposes and says that he is the attorney s for the above named Plaintiff-Appellant herein. That he is over 21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 15th. day of October, 1975, he served the within

Brief and Appendix

upon the attorneys for the parties and at the addresses as specified below

John F. O'Shaughnessy
County Attorney of Nassau County
Nassau County Executive Building
West Street
Mineola, New York

by depositing 3 copies of each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 15th. day of October, 1975.

Raymond J. Braddick

Roland W. Johnson
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977